



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CRIMINAL APPEAL NO. 107 OF 2017**

**TK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgement, conviction and sentence of Hon. Juma, CM, delivered on 17<sup>th</sup> August 2017 in the Chief Magistrate's Court at Narok in Criminal Case NO. 71 of 2016, Republic v TK)*

**JUDGEMENT**

1. The appellant has appealed against his conviction and sentence of twenty years' imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. The court did not make any find on the charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006
2. The appellant has raised five grounds of appeal in his petition of appeal to this court. In ground 1 the appellant has stated the unchallenged fact that he did not plead guilty.
3. In ground 2 the appellant has faulted the trial court in convicting the appellant without proof of the age of the victim to the required standard. The court after trying to conduct a *voire dire* examination, concluded that the victim of the crime was not unable to testify due to being mentally challenged. In this regard, the evidence of the mother of the victim (Pw 1) is that the victim was born in August 2004, according to the clinic card (exhibit 1). The victim developed mutism. The P3 form which was put in evidence as exhibit 2, by Felix Rotich (Pw 2), who found her age as 13 years. In view of this evidence, I find that the age of the accused was 12 years because the clinic card is more reliable than the assessment done by Pw 2. I therefore find no merit in this ground 2, which is hereby dismissed.
4. In grounds 3,4, 5 and 6 in a coalesced form the appellant has faulted the trial court for convicting him, when the offence was not proved. Mr. Yenko, counsel for the appellant has submitted the clinical officer, who examined the victim confirmed that he completed his report based on the post rape care form and was unable to tell as to whether the victim was raped.
5. The victim was dumb and deaf and does not know any sign language. Counsel has therefore submitted that the only evidence left is respect of rape is that of her mother, who is an intermediary. It is upon her evidence that the conviction was based. In this regard reference to the evidence of Felix Rotich (Pw 2), who is the clinical officer, is important. According to Pw 2, he examined the victim on 21<sup>st</sup> September 2016. His findings were as follows. The victim had a condition of not being able to communicate well and was on anti-conclusant drugs of epilepsy. The victim claimed she had pain on the left ribs region. There were bruises on the labia majora and minora and there was bleeding as at 16<sup>th</sup> September 2016 according to the post rape care form and the hymen was broken. There was no discharge but pain in passing urine. The pregnancy test was negative. No spermatozoa were seen. On urinalysis, there was blood in the urine. The post rape care form had been completed at Narosura Health Centre. While under cross examination, Pw 2 testified that what was in his report (the P3 form) was based on the findings on the post rape care form. Pw 2 then produced the P3 as exh 2 and the post rape care form as exh 3. Pw 2 finally, testified that from the test carried out, it was not possible for him to know who was the perpetrator of this crime.
6. The evidence of Elizabeth Nyaguthie (Pw 4) is that she knew the victim as they lived in the same place. On 16<sup>th</sup> September 2016, she fetched water. She then saw the victim going behind their plot. Before she reached the toilet of her plot, she heard screams of a child. She then left their toilets and met the appellant coming from the toilets in that place. The appellant escaped from the scene. She had known the appellant from his childhood. He had not zipped his trouser and had a rungu in the left hand and in the right hand he had a Maasai sword. At the zip area of his trousers there were blood stains. The appellant then told her that: ***".... he had done nothing to the girl, that he had begged her and refused. I had not asked him anything. The child left the toilet where the accused had emerged from. It was A.S. I went and picked the child using signs we use for talking to the child. She hears but had not talked. I asked what had happened. She pointed at the accused. I asked what he had done, she pointed at her private parts. As is disabled, she does not talk, she can answer back using signs. The girls clothes were wet, they had seminal fluid, it was smelling."***
7. Apart from the foregoing evidence, there is further evidence from the mother of the victim (Pw 1). Her evidence is that her daughter has a

disability, which she called mutism. While at a market, where she was selling vegetables she was rang to rush to her home. She returned home. She found her daughter had been raped by a man who had ran away. She rushed the child to hospital, where she was treated to prevent HIV and pregnancy. She then removed her clothes and put them in a box. She had been bleeding since the previous Friday. From that Friday she had had her menses (menstrual blood). She finally testified that she used to bathe the daughter daily and that she had no injuries, but her shorts had fluids and some blood.

8. The appellant's defence evidence was that people were just against him and that if he had defiled the victim, medical evidence would have stated so. He further stated that he was HIV positive and that if he had sexual intercourse with her, the victim would have contracted the disease.

9. The medical report of Felix Rotich (Pw 2) popularly known as the P3 form was completed by him using the information from the post rape care form that was prepared at Narosura Health centre. He was not the author of the post rape care form. It therefore follows that the evidence of that report is inadmissible. The mother of the victim did not see any injuries on her daughter. Therefore, penetration of the vagina by the penis was not proved. The charge of defilement was not proved. I therefore acquit him of defilement and the sentence of twenty years' imprisonment is hereby quashed.

10. However, I find that the offence of committing an indecent act with a child was proved. The presence of blood on the zip of the appellant's trouser must have come from the menstrual blood of the victim. She was put on anti-HIV treatment at the hospital on the same day to prevent infection. This explains why the victim was not infected with HIV. The running away of the appellant from the scene of crime is evidence which provides corroboration that the appellant had contact with the victim of a sexual nature. His defence evidence has no ring of truth and I reject it.

11. This is a first appeal. As a first appeal court, I have independently re-assessed the evidence and I find that the offence of committing an indecent act with a 12-year-old child was proved.

12. In sentencing the appellant, I am by law required to take into account both the mitigating and aggravating factors. The mitigating factors include the following. The appellant was a first offender. He has been in custody for about three years. The aggravating factor include the following. He indecently assaulted a 12-year old victim, who was mentally challenged. After taking all these factors into account, I hereby sentence the appellant to five years' imprisonment, which he now has to serve.

Judgement signed, dated and delivered in open court at Narok this 4<sup>th</sup> day of December, 2019 in the presence of Mr. Yenko for the appellant and Mr. Omwega for the respondent.

**J. M. Bwonwong'a**

**Judge**

**4/12/2019**